Mr. Butt states steering efficient and that probably Dunlop tanks in the lorry rolled about and not firmly rested caused lorry out of control. Fined $100/- or 3 months R.I. on the 1st charge. Cautioned and discharged on the 2nd charge. Licence to be endorsed."

Time and again pronouncements have been made by Judges of the Supreme Court as to importance and necessity of taking proper notes in a criminal case where the accused pleads guilty. I can only repeat such a pronouncement. Such a necessity is all the more obvious in a case of a serious nature such as this.

In this case I decided to record evidence myself and from such evidence it was clear to me that this was a case of gross negligence which resulted in the death of a harmless human being who was a passenger in the Respondent's lorry at the time of the accident and who was crushed to death when the lorry finally crashed into a bank after careering off the road surface into a side drain.

In such circumstances I considered that the sentence of the learned Magistrate was totally inadequate and I altered such sentence to one of 12 months' Rigorous Imprisonment.

Sentence enhanced.

[REVISIONAL CIVIL JURISDICTION]

TERREL, Ag. C.J.

November 3, 1938.

JOSEPH v. SAYAMPANATHAN (m.w.).

(SELANGOR CIVIL SUIT No. 806 of 1938)

SAYAMPANATHAN (m.w.) v. JOSEPH.

(SELANGOR CIVIL SUIT No. 936 of 1938)

Civil Procedure Code, Ss. 232, 573—Claims involving taking of accounts to what extent cognizable by Magistrates' Courts.

Two counter suits filed between the same parties involved the taking of accounts as between principal and agent. On a reference to the Judge for decision on the question whether such suits must necessarily be brought to the Supreme Court.

Held, that the Magistrate had jurisdiction under Section 232 of the Civil Procedure Code to hear and decide the suits, his jurisdiction not being affected by the fact that when accounts are taken in the Supreme Court a special procedure is laid down.

Held, further, that on such reference the parties are entitled to be heard if they so desire.

Reference to the Judge under Section 573 of the Civil Procedure Code.

Benjamin for Joseph.

Tenku Ismail for Sayampanathan.

Terrell, Ag. C. J.—The learned Magistrate has referred to the Supreme Court the question whether suits involving the taking of accounts must necessarily be brought to the Supreme Court.

Under section 573 of the Civil Procedure Code, parties are entitled to be heard if they so desire; but I understand from the note made by the learned Magistrate, that it was agreed that *counsel should submit their arguments in writing (which has been done)* and they do not desire to present further arguments orally.

There is no doubt that section 232 of the Civil Procedure Code applies to the Magistrate's Courts (see Schedule 4). The fact that when accounts are taken in the Supreme Court, a special procedure is laid down, does not affect the question of jurisdiction. It merely results in this, that if accounts have to be taken in a Magistrate's Court, such accounts have to be taken in a summary manner by the Magistrate himself.

Most money claims, cognizable by the Magistrate's Courts, involve the calculation of interest, or the allowance of sums paid to account. To this extent such claims involve the taking of an account, and it has never been suggested that such claims are not cognizable by the Magistrate's Court.

I rule, therefore, that the Magistrate has jurisdiction to hear and decide both the above suits.

Reference Answered.

[ORIGINAL CIVIL JURISDICTION]

RAJA MUSA, Ag. J.

June 10, 1939.

CHU CHIK SANG

v.

CHHI TIAM AND 30 OTHERS

(SELANGOR MAGISTRATE'S CIVIL APPEAL No. 4 of 1938)

Labour Code (Cap. 154) S. 152—Usage in mines.

There is a general usage in the tin mining industry among Chinese that daily paid coolies in a tin mine may leave, or be dismissed from, their employment without notice.

A. J. Bostock-Hill for Appellant.

Respondents in person.

Raja Musa, Ag. J.—In this case the Protector of Chinese, Selangor, as Deputy Controller of Labour

(Chinese) has, in effect, held that Daily paid Chinese labourers employed in a tin mine are entitled, in the absence of a specific agreement to the contrary, to one month's notice before dismissal.

This appeal has been brought, so I am told, because the principle involved is of extreme importance to the Chinese mining community.

The facts from which this appeal arises are quite clear and simple. The appellant is the advancer in a tin mine in Ampang, Selangor. In his labour force on that mine the thirty-one respondents were included. On the 6th April 1938, the respondents were paid all wages due to them for work done up to and including the 5th April, and their services were terminated. It is common ground that the respondents were daily-paid coolies in the sense that they were paid according to the day's work done, although their wages were paid at the end of each month.

After their dismissal they complained on the very next day to the Deputy Controller of Labour, who ordered the issue of a summons against the appellant, returnable on the 9th April. The proceedings terminated on the 11th April when the Deputy Controller of Labour gave judgment for the respondents in the following terms:—

> "It is clear from the evidence that they were dismissed without notice. There is no evidence that there was a fixed period of notice, defendant himself says that there were no conditions. I therefore hold that the presumption of 53 (ii) applies and that the agreements of the labourers with the employer was for a period of one month. This is supported by the accounts which were made up monthly and the entries which convert 'kungs' into wages is a figure which corresponds to a month's wages. I therefore hold that the complainants are entitled to one month's wages in lieu of notice."

The case for the appellant, briefly, is that in the case of mines Part VIII of the Labour Code applies, and in the construction of any agreement to labour under that part, mining usage shall be given effect to by virtue of section 152, and when such usage overrides any other specific provision of the Code, such provision shall be deemed to have been repealed—see section 148.

In the course of the hearing before the learned Deputy Controller of Labour the appellant in his evidence said:—

> "When the coolies want to leave after working a few days or any period when they hand tools in they are paid off. In the same case when we find too many men in the kongsi we balance their accounts and pay them off."

In cross-examination he said:—

"Q: Why did you not give notice?

A: All along there has been no such thing.

Q: Ought not the hang kong to know that we ought to get notice?

A: He knows that we have always discharged coolies like that.

Q: If you had given us notice should not we have been able to go and look for work?

A: You were taken on without conditions."

His kepala Chan Kam corroborated him on this point.

This evidence, to my mind, raised a defence of a usage in this particular mine, and in the light of the provisions of Part VIII of the Labour Code this defence must be considered.

Leave to adduce further evidence as to this usage and its notoriety was asked for.

Having considered section 558 of the Civil Procedure Code, and the authorities cited to me thereunder, I came to the conclusion that this is a case in which such leave should be allowed because, in view of the evidence I have already cited and its effect, I consider that there is a serious lacuna in the evidence recorded by the learned Deputy Controller of Labour, and that this additional evidence is necessary to enable me to come to a satisfactory conclusion in this matter.

I accordingly recorded the evidence of Mr. Choo Kia Peng, Mr. Han Sek Lee, and Mr. Pua Koon San.

Such evidence, in my opinion, clearly establishes a general usage in the tin mining industry amongst Chinese that daily paid coolies in a tin mine may leave, or be dismissed from, their employment without notice.

A usage to be binding must be notorious, certain and reasonable, and it must not offend against the intention of any legislative enactment—See *Halsbury (Hailsham)* Vol. 10, page 39.

From the whole of the evidence I am satisfied that this usage is notorious amongst Chinese tin miners. It is certain and I cannot see anything unreasonable in it, since the right to terminate the employment without notice is reciprocal.

I cannot see, also, that this particular usage offends against the intention of any legislative enactment. Section 152 of the Labour Code specifically authorises the importation of mining usages in the construction of

any contract of employment in a mine, and I am not aware of any provision of law which this particular usage contravenes or is inconsistent with.

For these reasons, whatever my sympathies may be, this appeal must be allowed, and the judgment of the learned Deputy Controller of Labour set aside. No order as to costs.

Appeal allowed.

(ORIGINAL CIVIL JURISDICTION)

GORDON-SMITH, J.

December 17, 1938.

YAM BINTI BABA v. LOY CHIM.

Executors (Powers) and Fatal Accidents Enactment (Cap. 19) S. 4 (ii)—death of child—negligence—assessment of damages.

In an action under Section 4 (ii) of the Executors (Powers) and Fatal Accidents Enactment (Cap. 19) for damages for the death of the plaintiff's child by reason of the negligent driving of a motor lorry by a driver in the employ of the defendant the Court found for the plaintiff on the question of negligence. It was established that the child was aged 12 and that he and his brother used to sell cakes made by their mother and sisters during the mornings and that they both earned money as golf caddies in the afternoons and evenings.

Held, that the assessment of damages in such cases is entirely a matter of speculation and that in the circumstances the plaintiff was entitled to receive the potential earnings of the child for a period of 5 years on the principle that the compensation should be assessed according to the length of time during which such earnings would be coming into the household.

TRIAL OF ACTION.

C. Mills for the Plaintiff.

F. G. Charlesworth for the Defendant.

Cur. Adv. Vult.

The judgment in this case is reported on the question of assessment of damages only.

After dealing with the facts of the case and his findings on the question of negligence, his Lordship, proceeded as follows:—

Gordon-Smith, J.—I come now to the assessment of damages. The Plaintiff sues under section 4 (ii) of the Executors and Fatal Accident Enactment, Cap. 19, which provides that "every such action shall be for the benefit of the wife, husband, parent, and child (if any) of the person whose death has been so caused and shall be brought by and in the name of the executor of the person deceased". A further provision is made in the event of there being no executor (as in this case) enabling any of the persons so mentioned for whose benefit such action might have been brought by an executor, to bring a similar action. The only person therefore who was entitled to bring this action was the Plaintiff, who is the sole surviving parent and it is for her benefit, and for her benefit only, that such action can be maintained. Consequently I have to assess the damages which she, and she only, has suffered by reason of the death.

Deceased was aged 12, and he and his elder brother used to sell the cakes made by their mother and sisters during the mornings, and they both earned money as golf caddies in the afternoons and evenings.

Plaintiff stated that on an average the deceased earned $30.00 per month. His brother said that between them they used to make about $70.00 per month. As a golf caddie Plaintiff stated deceased earned from $10.00 to $15.00 a month, and his brother said that he himself averaged $12.00 to $15.00 a month.

I think that both witnesses exaggerated this last amount and after full considerations and calculation as to what might be an average amount under normal conditions I fix such amount at $8.00 per month.

To try and fix the amount he earned as a cake seller is more difficult as I am unable to accept the evidence given, for the reason that I think it is also very much exaggerated. He was only a boy of 12 and I cannot accept the proposition that he was earning in the neighbourhood of $40 to $50 a month. It must be entirely a matter of speculation and I think I am not being ungenerous if I fix his earnings at $15 a month. With this and with his other earnings as a caddie it amounts to $23.00 a month. I am satisfied that he paid his earnings over to his mother, the Plaintiff.

In a somewhat similar case, *Morgan v. Scoulding*, 1938 1 K.B.D. at page 790, and under somewhat similar circumstances and where a boy of 23 was handing over to his mother 15s. a week out of his earnings, Lewis, J. awarded a sum of £300 damages in this respect under Lord Campbell's Act. This works out at a little over 7½ years earnings at this rate. Mr. Justice Lewis referred to the circumstances and said "In those circumstances one has to speculate as to how long this sum of 15s. a week would be coming into the household". It is entirely a matter of speculation and I have to speculate similarly. He might, like his brother, have acquired an ambition to become a motor driver on being ashamed to sell cakes